

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOE J.W. ROBERTS, JR.,

Plaintiff,

V.

VILMA KHOUNPHIXAY, *et al.*,

Defendants.

Case No. C19-014-TSZ-MLP

ORDER DENYING PLAINTIFF'S
MOTIONS FOR RELIEF UNDER FED. R.
CIV. P. 56(F), FOR AN EXTENSION OF
TIME, AND FOR APPOINTMENT OF
COUNSEL

I. INTRODUCTION

Plaintiff Joe Roberts is a state prisoner who is proceeding with this civil rights action *pro se* and *in forma pauperis*. This matter comes before the Court at the present time on Plaintiff's motion for relief under Fed. R. Civ. P. 56(f) (dkt. # 23), his motion for extension of time (dkt. # 24), and his two motions for appointment of counsel (dkt. ## 23, 27). Defendants have filed a response opposing Plaintiff's motion for extension of time and his first motion for appointment of counsel. Defendants have not responded to Plaintiff's request for relief under Fed. R. Civ. P. 56(f), nor to Plaintiff's second motion for appointment of counsel which was only recently filed. The Court addresses each of these motions below.

ORDER DENYING PLAINTIFF'S PENDING MOTIONS - 1

II. DISCUSSION

A. Motion for Relief Under Fed. R. Civ. P. 56(f)

Plaintiff asserts in the instant motion that prison staff have interfered with his ability to litigate this action by withholding and/or destroying his e-files and other legal property. (Dkt. # 23.) He asks the Court to order that he be provided a copy of the entire docket and that the legal liaison at the Washington State Penitentiary be directed to give him copies of all of the e-files he claims were lost by the Department of Corrections (“DOC”). (*Id.* at 2.)

Though Plaintiff indicates he is seeking relief under Rule 56(f) of the Federal Rules of Civil Procedure, it is not clear how that provision relates to the relief requested by Plaintiff in his motion. Rule 56(f) provides that a court may grant summary judgment for a nonmoving party, grant a motion on legal or factual grounds not raised by the parties, or consider summary judgment on its own. Plaintiff does not appear to be asking the Court to enter judgment against Defendants, he is merely asking that he be provided copies of his lost legal documents. Rule 56(f) simply does not apply here. The Court will nonetheless address Plaintiff's concerns regarding his missing e-files as that is clearly a matter of great frustration to him. (*See* Dkt. ## 23, 24, 27.)

The documents at issue appear to be Plaintiff's complaint (dkt. # 9), mail returned to the Court as undeliverable when Plaintiff was temporarily transferred out of DOC custody to attend court (dkt. # 12), the notice of appearance of Defendants' counsel (dkt. # 13), and the waivers of service returned by each of the Defendants (dkt. ## 14-21). With respect to Plaintiff's complaint, the Court previously directed the Clerk to send Plaintiff a copy his pleading (*see* dkt. 10 at 5, n.

1) 1), but it appears from the record that the Clerk overlooked that directive and failed to send the
2 pleading. The Court will direct that a copy of the complaint be sent to Plaintiff with this Order.

3 With respect to the remaining documents, Plaintiff fails to show any compelling need for
4 physical copies of these documents and it is difficult to discern how Plaintiff's lack of access to
5 the documents might possibly have interfered with his ability to litigate this action. A copy of the
6 Court docket should be sufficient to apprise Plaintiff of the nature of the documents he claims to
7 be missing, and the Court will direct that a copy of the docket also be sent to Plaintiff with this
8 Order. If Plaintiff believes he has a compelling need for a physical copy of any of the documents,
9 he may submit another motion explaining what he believes he needs and why.

10 **B. Motion for Extension of Time**

11 Plaintiff asks that he be granted a 45-day extension of time due to interference by prison
12 staff with his legal materials. (Dkt. # 24.) It is not entirely clear from Plaintiff's papers what
13 deadline he is referencing as, at the time Plaintiff filed his motion on April 19, 2019, there were
14 no deadlines pending. While the Court intends to issue an Order establishing pretrial deadlines in
15 conjunction with this Order, there are currently no deadlines to extend and Plaintiff's motion is
16 therefore premature.

17 **C. Motions for Appointment of Counsel**

18 Plaintiff makes a request for appointment of counsel in his motion for extension of time
19 (*see* dkt. # 24 at 1, 4), and he also recently filed a separate motion for appointment of counsel
20 setting forth in more detail why he believes appointment of counsel is appropriate in this case
21 (dkt. # 27).

1 Plaintiff is advised that there is no right to have counsel appointed in cases brought under
2 42 U.S.C. § 1983. Although the Court, under 28 U.S.C. § 1915(e)(1), can request counsel to
3 represent a party proceeding *in forma pauperis*, the Court may do so only in exceptional
4 circumstances. *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9th Cir. 1986); *Franklin v. Murphy*,
5 745 F.2d 1221, 1236 (9th Cir. 1984); *Aldabe v. Aldabe*, 616 F.2d 1089 (9th Cir. 1980). A finding
6 of exceptional circumstances requires an evaluation of both the likelihood of success on the
7 merits and the ability of the plaintiff to articulate his claims *pro se* in light of the complexity of
8 the legal issues involved. *Wilborn*, 789 F.2d at 1331.

9 Plaintiff's requests for counsel appear to be based to a significant degree on the alleged
10 interference by prison staff with his legal materials. It is difficult to discern from Plaintiff's
11 submissions whether his lack of access to his legal materials is the result of his transfers between
12 various facilities including one facility outside the DOC, of his placement on suicide watch
13 where he is not allowed access to his paperwork or, as he appears to suspect, of malfeasance by
14 prison staff. The Court is not persuaded that there has been any malfeasance by prison staff, nor
15 does it appear likely that Plaintiff's inability to access certain materials has actually interfered
16 with his ability to litigate this action which is still in its earliest stages. Thus, the alleged
17 interference by prison staff with Plaintiff's legal materials does not support his request for
18 appointment of counsel.

19 Plaintiff also argues in his motion that the issues he raises in this action are complex, and
20 he cites to the fact that he was appointed counsel in another pending action, *Roberts v.*
21 *Khounphixay, et al.*, C18-746-MJP, in which he raised similar issues. (Dkt. # 27 at 2.) Plaintiff
22 argues as well that he will face other complex issues such as cross-examining witnesses and
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1 obtaining discovery in the form of witness statements, privileged materials, video security
2 surveillance and e-mails. (*Id.* at 3.) The fact that Plaintiff was appointed counsel in another
3 action is not relevant to this Court's determination of whether appointment of counsel is
4 appropriate in this action at this time.

5 To the extent Plaintiff cites potential difficulties in conducting discovery, he has not
6 identified anything outside the typical challenges faced by prisoners litigating actions from
7 within the confines of a correctional facility, challenges which do not, by themselves, constitute
8 extraordinary circumstances. And, Plaintiff's concerns regarding the cross-examination of
9 witnesses are premature as it is too early in the life of this action for the Court to assess whether
10 the case is likely to proceed to trial. Plaintiff has some experience litigating in this Court and he
11 has thus far demonstrated ample ability to articulate the legal and factual bases of his claims
12 without the assistance of counsel. The complexities identified by Plaintiff do not, at this juncture,
13 entitle him to appointment of counsel.

14 Finally, Plaintiff argues that his case has merit and he cites to the allegations in his
15 verified complaint and to the exhibits attached to his complaint. While these documents were
16 sufficient to demonstrate that this case should proceed beyond the pleading stage, they are not
17 sufficient for the Court to draw any conclusions regarding Plaintiff's likelihood of success on the
18 merits of his claims. Based on the information available to the Court at this juncture, this Court
19 must conclude that Plaintiff has not demonstrated that his case involves exceptional
20 circumstances which warrant the appointment of counsel.

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III. CONCLUSION

2 Based on the foregoing, Plaintiff's motions for relief under Fed. R. Civ. P. 56(f) (dkt.
3 #23), for an extension of time (dkt. # 24), and for appointment of counsel (dkt. ## 23, 27) are
4 DENIED. The Clerk is directed to send copies of this Order to Plaintiff, to counsel for
5 Defendants, and to the Honorable Thomas S. Zilly. The Clerk is further directed to send Plaintiff
6 a copy of his complaint (dkt. # 9) and a copy of an updated docket sheet for this action.

DATED this 24th day of May, 2019.

M. J. Rekison

MICHELLE L. PETERSON
United States Magistrate Judge